EMPLOYMENT TRIBUNALS

Claimant: Mr C McCarthy

Respondent: Adam Recruitment Limited

Heard at: Manchester **On:** 13 November 2019
27 November 2019
(in Chambers)

Before: Employment Judge Ross

REPRESENTATION:

Claimant: Mr S Tettey, Counsel
Respondent: Mr T Wood, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for unfair dismissal is well-founded and succeeds.

2. By reason of the principle in **Polkey v A E Dayton Services Limited**, the award of compensation (basic and compensatory) is reduced by 80% because there was an 80% chance that the claimant would have been dismissed if a fair procedure had been followed. Any such dismissal would have taken place after 28 January 2019 (two months later than the claimant's dismissal).

3. Pursuant to section 123(6) Employment Rights Act 1996 the compensatory award is reduced by 50%. There a reduction of the basic award of 50% pursuant to section 122(2) Employment Rights Act 1996.

4. The claimant's claim for wrongful dismissal does not succeed.

REASONS

Introduction

1. The claimant was employed by the respondent as a Senior Recruitment Consultant. His employment was terminated for reasons of gross misconduct on 28 November 2018 in his absence. A further hearing was heard on 12 December 2018 where the claimant's dismissal was upheld. The claimant brought a claim to this Tribunal for unfair dismissal pursuant to the Employment Rights Act 1996 and wrongful dismissal.

The Issues

2. A List of Issues was agreed at the outset of the hearing:

Unfair Dismissal

(1) What was the reason for dismissal? The respondent relied on conduct.

(2) Did the respondent have a genuine belief based on reasonable grounds following a reasonable investigation of the claimant's conduct? The reasons relied upon by the respondent for dismissal were:

(a) On 22 November 2018 the claimant used his work laptop to access and use a personal Microsoft Word account in order to work on business planning;

(b) On 22 November 2018 the claimant visited an Account Manager at Lloyds Bank for personal purposes during work time;

(c) During that meeting the claimant share client information with the Account Manager; and

(d) Between 21 November 2018 and 23 November 2018 the claimant spent work time on the internet looking at non work websites.

(3) Was dismissal fair or unfair in all the circumstances including the size and administrative resources of the employer's undertaking and having regard to equity and the substantial merits of his case? In considering this question the Tribunal will have regard to the procedure followed by the respondent and whether dismissal was within the band of reasonable responses of a reasonable employer.

(4) If the dismissal was unfair, should there be any reduction by reason of the principle in **Polkey v A E Dayton Services Limited**?

(5) Should there be any reduction for contributory fault? (To the basic award by reason of section 122(2) Employment Rights Act 1996 and section 123(6) Employment Rights Act 1996 to the compensatory award).

Wrongful Dismissal

(6) Was there a repudiatory breach of contract by the claimant which entitled the respondent to dismiss him summarily without payment in lieu of notice?

Evidence

3. I heard from Mr Gahagan, Chief Executive Officer of the respondent, who dismissed the claimant, and Mr Leon Milns, a Board Director. I also heard from the claimant.

The Facts

I find the following facts:

4. The respondent is a small recruitment business based in Manchester. It was established by Mr Gahagan, his wife Vanessa and Mr Milns in July 2006. All three worked for a well-known recruitment company, Michael Page Recruitment, leaving to set up the present business.

5. The claimant joined the respondent's business as a Recruitment Consultant in October 2012. His contract is at pages 91-100 of the bundle. In the last 12 months of his employment the claimant worked as a Principal Consultant in the permanent recruitment of senior candidates (salaries of £60,000 and more) across all areas.

6. There is no dispute that the claimant was highly successful at his job. It is not disputed that with Mr Milns he was one of the highest achievers by billing results in the respondent's business.

7. The claimant was supplied with a laptop for his work. There is no express clause in the company's handbook about responsibilities in respect of company laptops (unlike mobile phones). However, the employee handbook has a computer policy which states (page 125):

> "You are only permitted to use the company's computer systems in accordance with the company's data protection monitoring policies and the following guidelines."

It states:

> "The company has the right to monitor and access all aspects of its systems including data that is scored on the company's computer systems in compliance with the Data Protection Act 1998."

It states:

> "Where the company's computer system contains an email facility you should use that email system for business purposes only."

On internet access it states:

> "You are required to limit your use of the internet to sites and searches appropriate to your job. The company may monitor all internet use by employees."

It states:

> "Monitoring of the company's computer systems and electronic communications may take place in accordance with the company's monitoring policy. Please refer to the company's monitoring policy for further details."

The monitoring policy states:

> "You should be aware that the company may carry out employee monitoring.
>
> Employee monitoring may be necessary to detect and/or investigate unauthorised or excessive use of the company's telecommunications system, detect and/or prevent crime and to maintain compliance with regulatory practices or procedures relevant to the company where applicable."

Types of monitoring include:

> "Checking websites visited by companies using company systems."

It goes on to state regarding additional monitoring:

> "The company reserves the right to introduce additional monitoring. Before doing so the company will identify the purpose for which the monitoring is to be introduced, ensure the type and extent of monitoring is limited to what is necessary to achieve that purpose, where appropriate consult with affected employees in advance of introducing the monitoring, weigh up the benefits that the monitoring is expected to achieve against the impact it may have on employees. The company will ensure employees are aware of when, why and how monitoring is to take place and the standards they are expected to achieve."

8. The claimant's contract of employment states:

> "You agree to devote the whole of your time, attention and abilities during your hours of work to promote, develop and extend the company's business and interests. You may not, without first obtaining the prior consent of the company, accept or hold any office or directly or indirectly be interested in any other trade, business or occupation whilst working for the company."

9. The respondent also had an email internet computer and telecommunication usage data confidentiality policy (pages 101-102) which states:

> "It is a condition of employment that you restrict the visiting of non work related sites to outside of the company core hours."

It also states:

> "You agree that all information stored on work computers or on the company database system remain the property of Adam Recruitment Limited at all times."

10. Although the claimant's financial targets continued to be met, Mr Gahagan became suspicious of the claimant. In September 2018 the claimant's line manager came to see him to express concerns and to suggest that the claimant was no longer being communicative about what he was doing.

11. At the beginning of November 2018, the claimant's line manager, Peter Baker, asked Mr Gahagan if he could check the claimant's work emails to see if he was doing the work he said he was. Mr Gahagan agreed this could take place. Mr Gahagan said he did not look at the claimant's work emails. He left that to Mr Baker. Mr Baker informed Mr Gahagan that there was nothing untoward in the claimant's work emails.

12. Mr Gahagan then decided to permit installation of monitoring software called Teramind recommended by their IT provider on the claimant's laptop to record all his screen activity. This took place on 22 November 2018. It is not disputed that the software monitored a personal Microsoft Office account which had been viewed on the claimant's work laptop and through that site, other websites.

13. The IT provider tested the software on 21 November 2018 and provided copies of the documents it said the claimant had viewed during that period at pages 185-315 to Mr Gahagan.

14. Mr Gahagan said he had viewed all the information given to him by the IT provider and considered it "pretty incriminating". He also stated, "I felt betrayed". He said the matter needed to be dealt with quickly to protect his business. He said, "My fear was he would take our data somewhere else".

15. There is no dispute that the monitoring software recorded what the claimant was doing on his work laptop on 22 November 2018. It is referenced "ADMSURF-004". The document shows the claimant was using his personal email during the working day (pages 79-89).

16. Mr Gahagan showed the screenshots to Mr Milns and asked him to be present at an investigatory meeting with the claimant on Monday 26 November 2018. The claimant was not pre-warned of the meeting, which took place at approximately 8.50am. The claimant was asked where he was on Thursday 22 November 2018. The claimant said he had been to see Andrew Ferguson who was looking to move from Lloyds Bank. Mr Ferguson is the local Business Manager at Lloyds, Accrington. The claimant was asked was he discussing a business plan with Mr Ferguson. The claimant did not accept that he was discussing a business plan with Mr Ferguson. He admitted he had written a business plan but had not committed to it. The claimant was suspended and issued with a suspension letter (page 74). His laptop was confiscated. The reason for suspension was:

> "It is alleged you have been using work time to set up a competing business using Adam Recruitment Limited's resources, customer data and intellectual

property. The company reserves the right to change or add to these allegations as appropriate in the light of its investigation."

17. The suspension letter was given to the claimant by hand. I accept the claimant's evidence that although it refers to the company's disciplinary procedure it was not enclosed.

18. Mr Gahagan suggested that the claimant said at the suspension meeting, "I guess there isn't much chance of coming back from this". The claimant denies he made that remark.

19. Mr Milns who attended the investigatory meeting as a notetaker made handwritten notes at page 73. He also sent a summary email to Mr Gahagan the same day at 10:11 (see page 90). Neither document refers to the alleged comment of the claimant. Given Mr Milns' evidence of how annoyed he felt: in his statement he said "I though Chris was lying through his teeth", and the fact he has noted quotations in his handwritten notes I am not persuaded that the comment was made by the claimant. If the claimant had made such a remark I find it very likely Mr Milns would have recorded it either in his handwritten note or in his email note.

20. Mr Gahagan issued an invitation to a disciplinary hearing dated 27 November 2018 to take place at 4.00pm on 28 November 2018, the next day. The allegations were:

(1) At around 2.30pm on Thursday 22 November 2018 you used your work laptop to access and use a personal Microsoft Word account in order to work on what appears to be business planning for a business called "Hive". Evidence to support this allegation is attached in the form of ten screenshots from your laptop.

(2) On 22 November 2018 you visited an Account Manager at Lloyds Bank for personal purposes even though you told the company you were visiting a potential candidate.

(3) Between 21 and 23 November 2018 you spent work time on the internet looking at non work websites. Evidence to support this allegation is attached in the form of a report that shows your internet use on your work laptop for that period.

(4) The company believes that you may have been preparing the business planning documents that are shown in the screenshots numbered 1-10 for your meeting with the Bank and may have shared client information with your Bank Manager.

21. There is a conflict about the delivery of the letter of 27 November 2018 (pages 76-78). Mr Gahagan says he sent it with the attachments listed at page 78 by a courier service, CitySprint, to deliver to the claimant's home address on 28 November 2018, the same day the hearing was due to take place at 4.00pm. He sets out in his statement how he has tried to obtain documentary evidence of that delivery from the courier company but has been unable to do so.

22. The claimant says he never received this letter and documents that day. I accept the evidence of the claimant. I find that if the letter had been hand delivered with the enclosed attachments by a courier there would be documentary evidence to show this. In addition the messages exchanged between the claimant and Mr Gahagan are consistent with the claimant not having received the information. See p335,339,337.

23. Meanwhile, the claimant had received a voicemail from Mr Gahagan at 15:40 on Tuesday 27 November 2018 asking him to attend a meeting the following day. Mr Gahagan sent a further text message confirming the meeting the following day at 4.00pm at The Hilton Doubletree and stating full details were on an email. The claimant responded stating that he had not received such details (page 335). Mr Gahagan replied saying that he had just sent two emails.

24. I find the claimant sent the respondent an email from his personal email (having been locked out of the respondent's IT and email system as of the morning of 26 November 2018). I find the email stated the claimant was not well enough to attend a meeting the following day. The claimant asked to reschedule the meeting and for clarification about the nature of the meeting (pages 331-332).

25. Mr Gahagan responded to the claimant's personal email saying he was not prepared to delay the meeting and would go ahead in the claimant's absence. He also said that the paperwork for the disciplinary hearing the following in a few minutes by email (pages 330-331).

26. There is no dispute that Mr Gahagan sent the email invitation to the disciplinary hearing and attachments to the claimant's work email and therefore he did not receive it (pages 340-341).

27. I find on the morning of 28 November 2018 the claimant attended an appointment with his GP and was subsequently signed off unfit for work due to stress at work for a period of two weeks (see pages 454-455). I find at 11:31 on 28 November 2018 the claimant explained he had not been provided with any specific allegations or any evidence against him prior to the disciplinary hearing, and that this had placed him in an impossible situation. He explained it had exacerbated his current health condition. P337-8

28. The disciplinary hearing on 28 November 2018 went ahead in the claimant's absence. The claimant was dismissed and a letter sent to him confirming the outcome was sent by email on 29 November 2018 to his personal email (see pages 342-345). Mr Gahagan stated that he found the allegations referred to in the invitation to the disciplinary hearing (which the claimant had not received at that stage) to be proven and he was dismissed.

29. The claimant appealed against the dismissal by a letter dated 3 December 2018 (pages 354-359). He alleged the dismissal to be substantively and procedurally unfair, denying he had committed any misconduct.

30. By the time of the appeal hearing the claimant had received the invitation to the disciplinary hearing dated 27 November 2018, and the following documents:

(1) The employee handbook (pages 103-178);

(2) The claimant's contract of employment (pages 91-100);

(3) The respondent's computer policy (pages 101-102); and

(4) A document entitled "Scan" which was screenshots of computer usage (pages 79-89).

31. The claimant was invited to a hearing entitled "Appeal Hearing" on 12 December 2018 (page2 371-372). In addition to the documentation supplied by the respondent to the claimant, the respondent also had an email from Andrew Ferguson sent on 10 December 2018 (pages 372-373), and a fit note from the claimant showing he was suffering from stress at work (pages 454-455).

32. The hearing took place. In attendance were Mr Gahagan, Mr Milns, the claimant and Natasha who attended as the claimant's notetaker. The respondent's notes are at pages 377-383 and the claimant's notes are at pages 385-392. The appeal hearing outcome was that the claimant remained dismissed (see appeal hearing outcome letter dated 18 December 2018 at pages 400-402).

33. There is no dispute that the appeal hearing was conducted again by Mr Gahagan despite the request of the claimant for someone independent to hear the matter.

34. It was not disputed that in the background at the appeal hearing Mr Gahagan played a video on a large screen which was the claimant accessing his work laptop on the relevant day in "real time". The full length of the video was variously referred to as nine hours (page 395) and four hours (in cross examination). There is no dispute it was not shown to the claimant in advance of the hearing or other than in the background at the same time as the disciplinary hearing proceeded.

Applying the Law to the Facts

35. Issue 1: what is the reason for dismissal? The respondent relies on conduct. There is no dispute that the reason for which the claimant was dismissed was potentially conduct, namely using work time to set up a competing business using trade secrets and confidential information, visiting a bank account manager during working hours to do so and unreasonable use of the internet for personal reasons in breach of the respondent's policies.

36. I therefore turn to issue 2: did the respondent have a genuine belief based on reasonable grounds following a reasonable investigation of the claimant's conduct? The claimant was dismissed for four specific matters of conduct.

37. The first matter was that on 21 November 2018 he used his work laptop to access and use a personal Microsoft Word account in order to work on business planning. There is no dispute that the claimant used his work laptop to access and use a personal Microsoft Word account on that date. The claimant disputed that he worked on business planning on that day. He agrees a business plan which he had produced earlier called "Hive" was accessed, but in a "read only" file.

38. Allegation 2 was that on 22 November 2018 the claimant visited an Account Manager at Lloyds Bank for personal purposes during work time. It was not disputed that the claimant visited Andrew Ferguson, an Account Manager at Lloyds Bank, Accrington during the working day on that date. The claimant disputed it was for personal purposes and submitted that Mr Ferguson was a prospective client. The respondent did not believe him.

39. Allegation 3 was that during that meeting the claimant shared confidential information with the Account Manager, Mr Ferguson. This was disputed by the claimant.

40. Allegation 4 was that the claimant between 21 and 23 November 2018 spent work time on the internet looking at non- work websites during working hours. Mr Gahagan relied on the screen shot at p89 which showed the claimant visiting non-work-related sites such as “sky blues talk” a football website.

41. I find that Mr Gahagan genuinely believed that the claimant had committed misconduct. He said in evidence he “felt betrayed” as soon as he saw the footage which the IT company obtained covertly from the claimant’s work laptop. However, the issue is whether he had reasonable grounds for that belief following a reasonable investigation.

42. The grounds for allegations (a) was that the claimant admitted visiting Mr Ferguson, Account Manager at Lloyds Bank, on 22 November 2018 and the screenshots showed a Hive document (business plan) was open during that time. P88. The claimant's explanation for that was that he was reading the business plan in the Branch but not when he was with Mr Ferguson.

43. The second allegation (b) is that the claimant had visited an Account Manager at Lloyds Bank for personal purposes during work time. The grounds for this were that the respondent did not believe the claimant's explanation. Neither did Mr Gahagan believe the contents of the email from Mr Ferguson obtained by the time of the appeal hearing p373, because he was a friend of the claimant. The respondent was suspicious because there was no record on the respondent’s “Bullhorn” system of Mr Ferguson being registered as a client.

44. The third allegation (c) was that during that meeting the claimant shared client information with Mr Ferguson. The evidence for that was that the Hive business plan was open in the claimant’s personal email account on the claimant's work laptop during the period of time he was at the Accrington Branch. The claimant disputed that he shared the business plan with Mr Ferguson and disputed that the plan included client information because all the data had public website details – there was no indication in the business plan which were clients of the respondent.

45. I find that the employer had grounds for allegations a and b because they had evidence that the claimant had viewed a business plan at the same time as attending a meeting with a Business Manager at Lloyds Bank. The respondent reasonably believed that the explanation of the claimant and the Account Manager that the real reason for the meeting was the Account Manager was a potential client of the respondent was implausible. The Respondent was suspicious because the claimant had not inserted any details about Mr Ferguson as a potential candidate onto their

online system Bullhorn. Mr Gahagan took into account although Mr Ferguson had supplied an email confirming the claimant's version of events, he acknowledged they were friends. Mr Gahagan did not believe the claimant's explanation he was on a break while he was waiting to see Mr Ferguson when he accessed the Hive business document.

46. It is difficult to see what grounds the respondent had that the claimant had shared client information with the Account Manager because the business plan which they had read did not identify clients as clients belonging to the respondent. (The detail of the business plan is not shown in the screenshots p79-89 but the claimant agrees he had supplied a copy of the business plan at the appeal meeting – see page 287 for the list of clients).

47. I turn to the issue of whether the employer could have considered that allegations (a) and (b) could have amounted to issues of conduct.

48. The respondent relied on the claimant's contract of employment which states,

> "You agree to devote the whole of your time, attention and abilities during your hours of work to promote, develop and extend the company's business interests. You may not without first obtaining the prior consent of the company accept or hold any office or directly or indirectly be interested in any other trade, business or occupation whilst working for the company."

49. The Tribunal heard evidence that lines between work and personal time were blurred in the respondent's organisation. The nature of the recruitment industry is such that calls are often made to potential candidates outside of the regular working day of 9.00am to 5.00pm. In addition, Mr Gahagan gave evidence that he was relaxed about employees working from home and/or taking time off for personal matters eg such as sports day as long as they worked hard and achieved. No specific questions would be asked.

50. Lines between personal communication and business communication were also blurred. There was no dispute the claimant managed his own diary. The claimant's evidence was that this was a job which was impossible to do within normal working hours 9.00am to 5.00pm and the respondent was well aware of that. They were also well aware that he regularly worked into the evenings and at other times.

51. The claimant's contract states "You agree to devote the whole of your time, attention and abilities during your hours of work to promote, develop and extend the company's business and interests. You may not, without first obtaining the prior consent of the company, accept or hold any office or directly or indirectly be interested in any other trade, business or occupation whilst working for the company

52. Once the respondent had found that the claimant was using his personal work Word account on his work laptop in order to work on business planning when he visited an Account Manager at Lloyds Bank for personal purposes during work time he was in breach of his contract of employment". Accordingly the respondent had a genuine belief based on reasonable grounds of that conduct.

53. So far as the investigation is concerned there were a number of procedural irregularities which are dealt with below. However, the key question in relation to the investigation was whether the respondent of this size and undertaking was entitled to instruct an external IT company to put software on the claimant's work computer so that accessed not only his work email account but his personal accounts (and indeed they accessed accounts belonging to his family too). What is relevant to this hearing is whether they were entitled to access his personal email on a work laptop.

54. This raises difficult issues of privacy. However, the company's policy at page 102 which the claimant had signed clearly states, "You agree that all information stored on work computers…remain the properly of Adam Recruitment Limited at all times" and the company handbook makes it clear that the company may carry out employee monitoring (see page 153). However, the respondent did not follow its policy. In particular it states:

> "If disciplinary action results from information gathered throughout monitoring you will be given the opportunity to see or hear the relevant information in advance of the disciplinary meeting."

55. On the basis of the failure to follow its own policy -in particular failure to provide the claimant with the covert evidence it had obtained in advance of the disciplinary hearing (the "real time" video footage) the respondent had not followed a reasonable investigation of a reasonable employer. A reasonable employer would follow its own policy.

56. Turning to allegation (d), the respondent did not have reasonable grounds for its finding that between 21 November 2018 and 23 November 2018 the claimant spent work time on the internet looking at non work websites and that this amounted to an issue of conduct.

57. Firstly, the screenshots before the dismissing officer which were relied upon at pages 79-89 do not clearly identify the sites visited by the claimant and the length of time upon each site. The breakdown at page 317 was only provided after the claimant's appeal had been dismissed. Secondly, although the respondent's policy states "it is a condition of employment that you restrict the visiting of non work related sites to outside of company core hours", the Tribunal accepts the claimant's evidence that visiting non work related sites during core hours was a regular occurrence at the respondent's workplace and no action was taken in relation to it. The Tribunal also finds there was a blurring between work time and non work time at the respondent premises given the expectation that employees would contact potential clients at lunch time and in the evening.

58. Accordingly, the Tribunal finds the respondent had a genuine belief based on reasonable grounds for allegations (a) and (b) but not allegations (c) and (d). However the grounds for allegations (a) and (b) were not based on a reasonable investigation for the reasons given above at paragraph 56.

59. The Tribunal turns to issue 3. Was dismissal fair or unfair in all the circumstances including the size and administrative resources of the employer's undertaking and having regard to equity and the substantial merits of his case? In considering this question the Tribunal had regard to the procedure followed by the

respondent and whether dismissal was within the band of reasonable responses of a reasonable employer.

60. I remind myself it is not for me to substitute my own view but to consider what a reasonable employer of this size and undertaking might fairly do.

61. The Tribunal has taken into account that the respondent is a small business. Nevertheless, there was a wholesale failure in relation to procedural fairness in this case. Firstly, the respondent refused to adjourn the first hearing despite being informed by the claimant that he was unwell.

62. Secondly the respondent failed to send the disciplinary letter and the attachments upon which it relied to the claimant before the first disciplinary hearing.

63. Thirdly Mr Gahagan was the person who commissioned the investigation of the claimant, heard the first hearing and dismissed the claimant and then heard the "appeal" hearing. Even though the respondent is a small employer, many small employers, certainly by the time of the second or "appeal" hearing, would have instructed an independent third party to conduct the appeal hearing.

64. There were other issues in relation to procedural fairness. The video showing the claimant's activity on the relevant date in "real time" was never disclosed to him prior to the hearing. Instead the minutes of the meeting show it was occasionally referred to at the hearing.

65. A further issue was that the IT company had disclosed extensive other documentation to Mr Gahagan which they had obtained from the claimant's work laptop and it is unclear what regard he had to those documents when he dismissed the claimant. In cross examination he suggested he did have regard to the information for example in p316.These documents were not disclosed to the claimant until the Tribunal proceedings.

66. The information produced to the claimant as supportive of the respondent's allegations of misconduct were not produced in a clear format. The screenshots at pages 79-89, in particular page 89, do not clearly identify the time and the internet usage is not clearly shown.

67. Having acted very hastily in proceeding to a hearing at very short notice, without sending the claimant a detailed disciplinary letter with attachments on which it relied and dismissing the claimant at that hearing in his absence, the respondent went on to hold a further hearing but once the claimant was dismissed from that hearing he had no opportunity to appeal.

68. For all these reasons dismissal was procedurally unfair and accordingly the claimant's claim succeeds at this stage and there is no requirement for me to consider the last issue i.e. whether the dismissal was within the band of reasonable responses of a reasonable employer.

The principle in **Polkey v A E Dayton Services Limited**

69. I remind myself that I must consider whether any deduction should be made in accordance with this principle from this case and in accordance with section 123(1) Employment Rights Act 1996.

70. I remind myself of the guidance of Elias J observation in **Software 2000 Limited v Andrews [2007] ICR 825** that:

> "Tribunals must have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation even if there are limits to the extent to which it can confidently predict what might have been…….. Tribunals should not shy away from considering whether or not to make a **Polkey** reduction on the ground that the exercise would be too speculative."

71. In this case the employer dismissed for a potentially fair reason in terms of allegation 1 and allegation 2. If the respondent had conducted a fair investigation and followed a fair procedure ensuring an invitation to the disciplinary hearing with all the relevant documentary information was sent to the claimant in good time in advance of the hearing, including the DVD of the "real time" evidence, I find any dismissal would not have occurred for a further two months. In reaching this finding I take into account that a reasonable employer, guided by the ACAS Code on Disciplinary procedure is likely to allow at least 1 postponement on the grounds of an employee's ill health. I remind myself the claimant was signed off sick for 2 weeks by his GP. I remind myself a fair procedure balances the right of the employee with the needs of the business. I have taken into account that the claimant was suspended during the relevant period and the respondent had seized his laptop limiting the prejudice to the business. I have taken into account that a fair procedure requires an appeal normally heard by someone other than the dismissal officer. I remind myself that disciplinary meetings are not normally held during the Xmas/New Year period from 24 Dec-1 Jan.

72. For all these reasons I consider a period of 2 months from the date of dismissal is a realistic time frame for a fair procedure to take place.

73. The question of a **Polkey** deduction requires the Tribunal to consider both whether the employer could have fairly dismissed and whether it would have done so. I find the respondent could have fairly dismissed for allegations 1 and 2. However, if it had followed a fair procedure it is by no means certain that it would have done so. A fair procedure would have involved, by the appeal stage, requiring an independent external third party to hear the appeal. That person would have to balance the claimant's evidence and Mr Ferguson's evidence which suggested that the claimant meeting Mr Ferguson had been for a legitimate work -related reason namely Mr Ferguson as a potential candidate to be placed for recruitment as set against the more circumstantial evidence that the nature of Mr Ferguson's job as a bank manager together with the evidence the claimant had viewed his business plan in "read only" mode whilst at the bank's premises meant the real reason for the meeting was to discuss the claimant's own business plan during working hours. An independent person may have preferred the evidence of the claimant and Mr Ferguson and found that the meeting was legitimate.

74. I consider it unlikely an independent person would dismiss for sharing confidential information (ground c) because of the lack of any evidence in the business plan that the claimant shared confidential information.

75. I find it is unlikely such an adjudicator would have dismissed the claimant for the other ground (d)- breach of the internet policy- given the lack of cogent evidence about how that policy was applied and the blurring of the lines of what exactly amounted to working hours in the respondent's business. The claimant was entitled to regulate his own diary and expected to work outside core hours on a regular basis and was allowed a degree of flexibility when carrying out non work activities in work hours, e.g. the example of sports day.

76. However, weighing up all these factors and including the email at p315a from Mr Ferguson which refers to a business plan, sent the day before the meeting at Accrington branch, it is considerably more likely than not that an independent person would find the claimant met Mr Ferguson during work hours to discuss his business plan to set up his own recruitment business and to dismiss the claimant fairly for conduct for that reason. I consider the likelihood of a fair dismissal for conduct to be 80% and therefore I find it is just and equitable to reduce the compensatory award by 80%.

77. I turn to the second issue of contributory conduct. I must consider whether, in accordance with section 123(6), the claimant was responsible for culpable or blameworthy conduct which caused or contributed to his dismissal. I am not persuaded by the claimant's explanation and that of Mr Andrew Ferguson that the reason the claimant attended a meeting with him at his bank on 22 November 2018 was to discuss Mr Ferguson as a potential client for the respondent, because he was looking to move jobs.

78. The claimant said in evidence that Mr Ferguson was a friend of his who he saw a couple of times a year. There is no dispute that Mr Ferguson, known as "Gus", had sent the claimant a message the day before the meeting "start with this as it might help with the business plan and thinking about a few areas you're already looking at. You will probably need to copy and paste the links into Google to bring them up. I will see what I can get on profit and loss projections. The postcode for Accrington branch is BB5 1EP".

79. It seems implausible that this related to anything other than a proposed discussion the following day about the claimant's business plan. The reason the claimant had created a business plan "Hive" was he was thinking of setting up on his own as a recruitment consultant. I find that the claimant showed his business plan to Mr Ferguson and that is why it was open in "read only" mode on his personal email on the work laptop.

80. I am not satisfied the claimant disclosed confidential information. I accept the claimant's evidence that the business plan does not identify that the clients belong to Adam Recruitment and that this information is publicly obtainable.

81. I find the claimant understandably did not consider it was wrong to access his personal email on his work laptop. There was no guidance expressly informing employees that they were not entitled to access a personal email account on a work

laptop. I have borne in mind that there were many blurred lines in this organisation given the nature of the business. There were blurred lines between core hours i.e. although there is reference to core hours in the contract the parties agreed it was necessary frequently to work in evenings, in lunchtimes and before and after work. There was evidence of blurring of work/home life where Mr Gahagan agreed he would have no objection to someone going to a sports day in working hours. The claimant was a senior employee with a high degree of autonomy, responsible for organising his own diary. He explained he accessed work emails on a personal mobile phone.

82. However, the claimant had signed a contract where he agreed to "devote the whole of your time, attention and abilities during your hours of work to promote, develop and extend the company's business and interests" and also that "you may not without first obtaining the prior written consent of the company accept or hold any office or directly or indirectly be interested in any trade, business or occupation whilst working for the company". It is clear that attending a meeting with a bank manager about his own potential business would be in competition with the respondent in breach of those obligations despite the blurring of work/leisure lines. There is no dispute that this conduct did directly contribute to the claimant's dismissal. I consider it just and equitable to reduce compensation by 50%.

83. I turn to consider whether there should be any reduction in the basic award. The test is different under section 122(2). The Tribunal has a wide discretion whether or not to reduce the basic award on the ground of any kind of conduct on the employee's part that occurred prior to the dismissal. I have made the same reduction of 50% for the findings above, namely that the claimant should have realised that visiting a bank manager who was a friend to discuss a business plan for his own business which was in competition with the respondent during work time was culpable or blameworthy conduct.

84. In reaching this figure of 50% both the basic and compensatory award I have had regard to the guidance about a double penalty where a deduction has also been made under Polkey principles.

<u>Wrongful Dismissal</u>

1. The question is whether there was a repudiatory breach of contract which justified the respondent dismissing the claimant summarily without a payment in lieu of notice.

2. The claimant's contract of employment expressly says he agrees to devote the whole of his time, attention and abilities during his hours of work to promote, develop and extend the company's business and interests, and that he may not without first obtaining the prior written consent of the company accept or hold any office or directly or indirectly be interested in any other trade, business or occupation whilst working for the company. It is clear from my findings above that on 22 November 2019 the claimant was in breach of those clauses by attending a meeting with Mr Ferguson in Accrington which was related to setting up his own business, in competition with the respondent. I find this was a repudiatory breach of contract, going to the heart of the contract, and the respondent was entitled therefore to dismiss summarily.

3. For the avoidance of doubt, I find there was no repudiatory breach of contract in relation to disclosure of confidential information because I find that the business plan did not identify to whom the clients belonged and the information was publicly available. I find there was no breach of the internet policy in terms of how it was used at work because although there was a clause stating internet usage should be work related in core hours I entirely accept the claimant's evidence that employees did use the internet for non work related matters and employees were not penalised for it.

Employment Judge Ross

Date: 3 December 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
9 December 2019

FOR THE TRIBUNAL OFFICE